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IN THE

Supreme Court of the United States

October Term, 1955.

No. 298.

UNION TRUST COMPANY, et al.,
Petitioners,

v.

EASTERN AIR LINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR EASTERN AIR LINES, INC., IN OPPOSITION.

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OPINION BELOW.

The Opinion of the Court of Appeals is reported at 221 F. 2d 62, and is printed in Appendix A of the Government's Petition in the companion case against the Government, entitled *United States of America, Petitioner v. Union Trust Company et al.*, No. 296. There was no Opinion in the District Court.

QUESTIONS PRESENTED.

The petitioners state (pp. 2, 3) that three questions are presented in their application. It is respondent's position that none of the questions so stated is presented by the record. The Court of Appeals has merely reversed a judgment based upon a jury verdict and remanded the case for a new trial, limiting its remand to the question of liability. The remand was based primarily upon a finding by the Court of Appeals that petitioners had failed to sustain their burden of proof in the trial court. "Affirmative testimony that the Eastern plane was cleared to land was not countered by evidence sufficient to form a factual issue; hence the appellees failed to carry their burden of showing the contrary by a preponderance of the proof." (221 F. 2d 62, 72, 73; U. S. 22a) There has been no final judgment in the case.

The only question involved is whether this court should exercise its supervisory power and review a non-final judgment in which the Court of Appeals, because of errors of law committed in the trial court, reversed a judgment of the District Court entered upon a jury verdict and remanded the case for a new trial.

STATEMENT OF THE CASE.

Petitioners' statement of the case (pp. 3-12) is nothing more than an incomplete recital of some conflicting evidence. The case, as far as this Petition is concerned, may be briefly stated as follows:

In wrongful death actions against Eastern Air Lines to recover for the deaths of passengers which resulted from a mid-air collision at the Washington National Airport on November 1, 1949, between a Bolivian P-38 military plane in test flight, and an Eastern DC-4 on a regularly scheduled flight, one of the principal allegations of negligence upon the part of Eastern was that at the time of the collision its plane was in the process of landing at the airport without

proper clearance from the control tower. Upon the trial, Mr. Tigner, the Air Traffic Controller in the control tower at the airport, testified categorically that prior to the collision he had cleared the Eastern plane to land, and at the time of the collision the Eastern plane was precisely where it was supposed to be. His testimony in this respect was corroborated by other substantial evidence in the record. Petitioners, in an effort to prove the contrary, namely, that the DC-4 was not cleared to land, called Lieutenant Shaw, a co-pilot on a National Airlines plane which was in the air some minutes behind the Eastern plane. Lieutenant Shaw, among other things, testified that although the radio of his plane was tuned to the tower frequency, he did not hear on his earphones the Eastern plane cleared to land. The jury, returning answers to special interrogatories, found that Eastern was liable. On appeal, the Court of Appeals held that the purely negative testimony of Lieutenant Shaw was, on the record, insufficient to sustain the burden which rested upon the petitioners in the face of the affirmative testimony that the Eastern plane was cleared to land. The judgment of the District Court was reversed and the case remanded for a new trial on the issue of liability only. (221 F. 2d 62, 72; U. S. 22a, 23a)

There were other questions involved in Eastern's appeal to the Court of Appeals which, with the exception of the situs of the accident, that court did not pass upon in reversing the judgment of the District Court. (221 F. 2d 62, 73; U. S. 23a; App. A 6a)

Petitioners' statement of the case is replete with factual inaccuracies and inferences which are without support in the record of eleven volumes. Respondent, however, does not believe that any of those statements or inferences has any particular bearing upon the simple question presented, and, accordingly, it will not burden the court nor extend this Brief by dealing with such inaccuracies.

ARGUMENT.

No Final Judgment Has Been Entered in This Case. The Decision Below Merely Reversed a Judgment Based on a Jury Verdict for Errors of Law and Remanded the Case for a New Trial. It Was in Strict Accordance With Well-Established Rules of Appellate Review and Recognized the Exclusive Province of the Jury by Remanding the Case for a New Trial. It Did Not, as Petitioners Erroneously Assert, Rule Upon Any Question of the Credibility of Witnesses. It Did Not Depart From, or Sanction a Departure From, the Accepted and Usual Course of Judicial Proceeding.

Petitioners' argument presents the case as though the Court of Appeals had reversed the judgment and dismissed the complaint. The authorities cited by petitioners on pages 13 and 14 of the Petition are cases in which the judgment of the Court of Appeals was a *final* judgment disposing of the entire litigation. *There is no final judgment here.* The Court of Appeals did not decide that no jury question was present. Quite the contrary. It remanded the case for a new jury trial.

The reversal and the remand were the necessary legal results of a finding that an error of law had been committed by the trial court in assigning to the negative testimony of one of petitioners' witnesses a probative value which, under a well-settled rule of law, it did not possess. That rule of law is not challenged by the petitioners, as, indeed, it could not be. It is supported by decisions of the Court of Appeals for the District of Columbia, the Court of Appeals for the Sixth Circuit and by decisions of the States of Louisiana, Pennsylvania, Utah, Nevada, New York, Wisconsin and Massachusetts. (221 F. 2d 62, 72) It

is not, as petitioners assert, in conflict with the decisions of this court nor any of the other several circuits.

The unanimous opinion of the Court of Appeals in this case was in strict accordance with the well-established rules of appellate review; and petitioners' assertion that it invaded and usurped the province and function of the jury is plainly belied by the fact that the case was remanded for a new trial. Petitioners' repeated assertions that the Court of Appeals usurped the jury's function is contradicted by the principal record fact that this case has been remitted to the trial court for a jury trial on the single issue of liability. Therefore, none of the authorities cited by petitioners is apposite to the situation at bar.

The decision below did not, as petitioners erroneously assert, rule upon any question of the credibility of witnesses; nor did it rule that the testimony of any witness had to be accepted by the jury over that of any other witness. Petitioners endeavor to complicate the ruling of the Court of Appeals which was to the single effect that petitioners had failed to sustain the burden of proving that the Eastern plane had not been clear to land. ". . . hence the appellees failed to carry their burden of showing the contrary by a preponderance of the proof." (221 F. 2d 62, 73; U. S. 22a)

The Court of Appeals carefully observed the well-established rules of appellate review and did not depart from, nor sanction a departure from, the accepted and usual course of judicial proceedings.

This case is merely remanded for a new trial. It is not based upon a final judgment. The Petition before this Honorable Court does not call for the exercise of its supervisory powers.

CONCLUSION.

It is, therefore, respectfully submitted that the Petition should be denied.

Respectfully submitted,

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